IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON,

Petitioner,

vs.

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

GERALDINE G. CANNON,

Petitioner,

vs.

NORTHWESTERN UNIVERSITY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOINT BRIEF OF RESPONDENTS THE UNIVERSITY OF CHICAGO AND NORTHWESTERN UNIVERSITY.

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This brief is submitted on behalf of all respondents other than the federal respondents.

STATUTES INVOLVED.

Petitioner's brief includes only the first section of Title IX of the Education Amendments of 1972, omitting those sections relating to administrative enforcement and judicial review. The relevant portions of sections 901-903 of the Act (20 U. S. C. §§ 1681-83) are set out in the Appendix to this brief. The comparable provisions of Title VI of the Civil Rights Act of 1964, sections 601-603 (42 U. S. C. §§ 2000d-2000d-2), are also included in the Appendix.

QUESTION PRESENTED.

Title IX of the Education Amendments of 1972 (86 Stat. 373-75; 20 U. S. C. § 1681 *et seq.*) declares that no person shall be subject to discrimination on the basis of sex in any federally assisted education program. Effectuation and enforcement of Title IX is delegated to the Department of Health, Education and Welfare; agency action is subject to judicial review. No independent private right of action is provided. Was the court below correct in concluding that no independent private right of action could be inferred and that federal administrative enforcement followed by judicial review is the exclusive remedy?

STATEMENT OF THE CASE.

Petitioner Geraldine Cannon, a woman over 30 years of age, applied for admission to the 1975 class at both The University of Chicago Pritzker School of Medicine and Northwestern University Medical School, the medical schools of the respondent universities. After applications were rejected by both schools, she filed administrative complaints with the Department of Health, Education and Welfare in April, 1975 (App. 16), alleging that each respondent medical school had discriminated against her on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*

The theory of her administrative complaint was that the schools had a policy of discouraging applicants over 30 years of age and that this policy had a "disproportionately adverse effect upon women." Pet. Br. 3.

Within a few months of filing her administrative complaints and while investigations were pending, she initiated this action, filing substantially identical complaints against each respondent school[1], alleging the same Title IX violation charged in the administrative complaints before HEW. She also alleged violation of her Fourteenth Amendment rights under 42 U. S. C. § 1983; § 799A of the Public Health Services Act, 42 U. S. C. § 295h-9; and the Age Discrimination in Employment Act, 29 U. S. C. §§ 621 *et seq.*

After the trial court dismissed the original complaints, petitioner filed amended complaints substantially identical to the original, but adding as additional parties the Secretary of HEW and the Regional Director of the Office for Civil Rights of HEW. App. 3.

The amended complaints sought, *inter alia*, injunctions against the respondent schools requiring her admission. Alternate relief against HEW under the Administrative Procedure Act, 5 U. S. C. § 706, was requested: an injunction prohibiting HEW from failing to investigate promptly and take appropriate actions "including conciliation and efforts to obtain voluntary compliance with respect to plaintiff's administrative complaint." App. 19.

Motions to dismiss the amended complaints on jurisdictional grounds were filed by the schools. App. 39, 43. HEW answered in its own name, stating, *inter alia:*

> "The defendant [HEW] further asserts that the Civil Rights Act of 1964 . . . as amended by Title IX of the 1972 Education Amendment does not give jurisdiction to this court of the subject matter. Under Title IX as well as Title VI, judicial review of the Department's action is pro-

1. The separate suits against each of the respondent schools were consolidated in the Court of Appeals.

vided for after a final decision has been made on a complaint filed with the Office of Civil Rights." App. 44-5.

The trial court dismissed the amended complaints on jurisdictional grounds, holding with respect to Title IX that while the Title "provides for judicial review of agency action, it does not authorize a private right of action against the University." 406 F. Supp. 1257, 1259.

The Court of Appeals affirmed. It found insufficient "state action" to support the Fourteenth Amendment allegations under § 1983; the Age Discrimination in Employment Act inapplicable since petitioner was seeking admission as a student, not as one seeking employment through respondent schools; and no jurisdiction under Title IX or the Public Health Services Act. With respect to the alternate claim under the Administrative Procedure Act, 5 U. S. C. § 706, for relief against HEW, the Court observed that "HEW is actively investigating plaintiff's complaint and the delay involved of about one year has not been unreasonable." 559 F. 2d 1063, 1077; Cert. Pet. A-20.

With respect to Title IX, the Court concluded: "It is clear that no individual right of action can be inferred from Title IX in the face of the carefully constructed scheme of administrative enforcement contained in the Act." 559 F. 2d at 1073; Cert. Pet. A-14.

Shortly after the Court of Appeals' initial opinion was promulgated in August 1976, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, was enacted. A petition for rehearing was filed by petitioner relying in part upon the new Act in support of her contention that a private right of action was in fact intended under Title IX. The Court of Appeals then granted rehearing solely on the Title IX issue. 559 F. 2d at 1077; Cert. Pet. A-23.

Consistent with its answer to the amended complaints, HEW had argued until this point that there was no independent private right of action. In its brief to the Court of Appeals it contended that "plaintiff's remedy for alleged sex discrimination is limited to Title VI's administrative procedure as incorporated by reference into Title IX's statutory provisions," and that Title IX "precludes direct action by the individual." HEW Br. Ct. App. 8, 13. HEW filed an answer opposing the petition for rehearing for the reason that the petition "raises no issues justifying reconsideration."

Then, without explanation, HEW withdrew its answer opposing the rehearing petition and filed a substitute answer in which it completely reversed its position, claiming now that "the administrative procedure . . . is not the exclusive mechanism for enforcing Title IX, and the legal rights established by [section 901] can be effectively enforced by individuals bringing private causes of action." Since then HEW has opposed our position with as much vigor as it previously supported us.[2]

Upon full consideration of the Attorney's Fees Award Act and the new arguments raised by HEW in support of a private right of action, and after re-examination of its initial reading of *Lau* v. *Nichols*, 414 U. S. 563 (1974), the Court of Appeals reaffirmed its previous holding that "no private cause of action lies under Title IX in the circumstances of this case." 559 F. 2d at 1077-78; Cert. Pet. A-34.

A petition for rehearing *en banc* on all jurisdictional grounds asserted in the amended complaint was subsequently denied.

Only the Title IX issue was raised in the petition for *certiorari*.

2. The Court of Appeals noted in its opinion on rehearing:

[W]e were also curious as to why the Department of Health, Education and Welfare, which had consistently supported its codefendants' position that no private cause of action lies under Title IX, did an about face on the merits of that issue in its answer to plaintiff's petition for rehearing. Unfortunately, neither the Department's answer nor its subsequent brief on rehearing explains why the Department no longer believes that "Title IX's administrative procedural remedies were meant to suffice in enforcing Title IX's prohibitions against sex discrimination." Citing HEW's Supplemental Brief. Cert. Pet. A-28; 559 F. 2d at 1080.

SUMMARY OF ARGUMENT.

I.

The underlying issue is the balance between the freedom of a university to select its student body and the implementation of the Congressional policy expressed in Title IX of the Education Amendments of 1972 that no person be excluded on the basis of sex from participation in any graduate admission program receiving federal money.

Petitioner would subject the admissions decisions of universities to judicial scrutiny at the behest of a disappointed applicant on a case-by-case basis.

Petitioner's own situation illustrates the exposure. She was one of 5,400 applicants for 104 positions in the 1975 entering class of The University of Chicago Pritzker School of Medicine. Over 2,000 unsuccessful applicants had academic qualifications superior to hers. Yet she claims she was denied admission because of her age and sex.

We contend that subjecting individual admissions decisions to judicial inquiry before development of a national policy on an alleged discriminatory criterion threatens academic freedom and would force admissions decisions to be made solely on quantifiable factors such as test scores—a result not in the public interest. HEW has recognized that the issues raised by petitioner in her administrative complaints are of first impression and national in scope and that national policy must be developed. Trial courts are ill-equipped for this task; Congress did not intend they perform this function. The flexibility of the administrative procedure Congress provided permits a broad approach to an issue such as that raised by petitioner. The judiciary is not excluded; but its role is limited to review after agency action.

II.

Title IX of the Education Amendments of 1972 was based on Title VI of the Civil Rights Act of 1964; their relevant terms, except for the description of the prohibited discriminatory conduct, are identical. Title IX declares a policy of nondiscrimination in federally funded education programs; provides a detailed administrative procedure for effectuating the policy by issuance of general rules, regulations or orders; provides for voluntary compliance and administrative hearing and eventual fund termination if voluntary compliance is not forthcoming. Judicial review of agency action is provided. The plain terms of the Title support the conclusion of the Court of Appeals that the express provision of a sophisticated scheme of administrative enforcement excludes any private judicial remedies other than judicial review of agency action.

The conclusion is reinforced by an examination of the setting of Title VI—the prototype for Title IX. Title VI was part of the Civil Rights Act of 1964 which included Titles relating to prohibition of other forms of discrimination, including voting rights, public accommodations, public education and employment. The other Titles all provide for a private right of action by the aggrieved party. Only Title VI of the non-discrimination Titles fails to provide a private right of action. The omission could not be inadvertent.

The contemporaneous statements of the proponents of Title VI are consistent with the language of the Title. The first section of the Title was a declaration of policy to be implemented through the administrative procedure spelled out in the second section. Typical is the statement of Senator Humphrey, one of the principal architects of the 1964 Civil Rights Act, in describing Title VI: "Section 602 is the implementing section to the general policy laid down in Section 601." 110 Cong. Rec. 8978. The primary purpose was to end discrimination, not to terminate funding—but the purpose was to be achieved

through the administrative process with primary reliance on voluntary compliance.

A specific proposal was made to include an independent private right of action, but this was rejected.

Title IX—adopted eight years after Title VI—was described by Senator Bayh, its principal sponsor, as "identical language, specifically taken from Title VI," requiring "notice and the normal administrative procedures." 117 Cong. Rec. 30407. Contemporaneous amendment of other statutes to specifically provide a private right of action manifests an intent to limit Title IX to the administrative process, as Senator Bayh's statements clearly implied.

Apart from the judicial review provisions of Titles VI and IX, the doctrine of exhaustion of remedies would require that the administrative procedure established by Congress be pursued before judicial intervention. Lower court decisions support the doctrine. HEW itself has stated that it "should be allowed to fulfill its Title VI [and presumably Title IX] responsibilities, and exercise its expertise so that if a judicial determination need ever be made, it can be done on the basis of a thorough administrative record."

III.

Petitioner's reliance on subsequent legislation and prior decisions do not support her claim that they manifest a congressional intent and judicial recognition of an independent private right of action.

The three statutes—The Rehabilitation Act of 1973, The Age Discrimination Act of 1975, and the Civil Rights Attorney's Fees Awards Act—shed no light on congressional intent in 1964 or 1972 when Titles VI and IX, respectively, were adopted.

In none of the prior decisions cited by petitioner, federal respondents, or *amici* supporting petitioner, was the issue of a private right of action expressly raised, briefed or considered. All but two involved public officials or agencies and hence jurisdiction was not an issue. In the two cited cases which concerned private parties, the defense was that the statute was not applicable; jurisdiction was not an issue. *Laufman* v. *Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S. D. Ohio 1976); *Hawthorne* v. *Kenbridge Recreation Association*, 341 F. Supp. 1382 (E. D. Va. 1972). The instant case is the first reported case in which the issue of an independent private right of action under Titles VI or IX was directly raised and fully briefed.

IV.

Administrative complaints were filed with HEW prior to the start of this litigation; on-site investigations of petitioner's administrative complaints were completed more than 2½ years ago; HEW has told petitioner that her administrative complaints raise issues "of first impression and national in scope," and that "national . . . policy must be developed." In June 1976 she was "assured that we will move as expeditiously as possible in this matter." Cert. Pet. A-35.

HEW, while arguing to this Court there is no inconsistency between an independent right of action and the administrative procedure, has advised the Court that it will act on petitioner's administrative complaints *if* this Court decides she has no private right of action.

It is our position that HEW should complete the development of a national policy as it assured petitioner it would do. Petitioner is entitled to the alternate remedy she has requested—recourse against HEW under Section 706 of the Administrative Procedure Act. Her remedy is not in an independent private action against these respondents.

ARGUMENT.

I.

Introduction.

> "The number of qualified, indeed highly qualified, applicants for admission to existing medical schools in the United States far exceeds the number of places available. Wholly apart from racial and ethnic considerations, therefore, the selection process inevitably results in the denial of admission to many *qualified* persons, indeed, to far more than the number of those who are granted admission." Justice Blackmun.[3]

The "ultimate question," observed Justice Blackmun, is: "Among the qualified, how does one choose?" *Bakke,* 98 S. Ct. at 2808.

This case underlines the problem. Petitioner met the minimum qualifications required for application. She was one of over 5,400 applicants for 104 places in the 1975 entering class at The University of Chicago Pritzker School of Medicine. 559 F. 2d at 1067; Cert. Pet. A-3[4].

Geraldine Cannon claims she had higher academic qualifications than a substantial portion of the students admitted by each school. Pet. Br. 3. The facts belie the claim: her Medical College Admission Test score ("MCAT") in mathematical skills placed her in the lowest 20% of the applicant group at The University

3. *Regents of the University of California* v. *Bakke,* 98 S. Ct. 2733, 2806 (1978), hereafter called "*Bakke.*"

4. The statistical data relating to Ms. Cannon derives from an affidavit of the Dean of Students and Director of Admissions of The University of Chicago Pritzker School of Medicine, submitted in support of The University's motion to dismiss or for summary judgment. App. 24-28. The ratio of applicants to acceptances at Northwestern University's School of Medicine for the same year was 80 to 1. The admissions practices at Northwestern are similar to those at Chicago. 559 F. 2d at 1067; Cert. Pet. A-3n, 1; Joint Br. in Opposition, 4n2.

of Chicago Medical School; her science score placed her in the lower half of the applicant group. There were at least 2,000 *unsuccessful* applicants with better academic qualifications than petitioner. 559 F. 2d at 1067; App. 27.

Upon being informed that she was not selected for admission, Cannon wrote to the Dean of Students of The University of Chicago Medical School, who was also Director of Admissions, expressing her disappointment "because my college grade point average and MCAT scores appeared to be well within the published range for such academic qualifications." App. 37. The Dean responded that "although your academic credentials were good they fell far below the level of the accepted students in our next entering medical class. Annually the competition for places in our entering class is extremely keen and this year was no exception for we had in excess of 5,400 applicants for the 104 places we had to offer." App. 38.

Petitioner is not satisfied with this explanation. She believes she was excluded from consideration because of her age which she claims was a factor under an alleged policy which discourages older persons from applying for admission at respondent schools. This policy has an adverse impact on women—she claims—because women tend to apply to graduate schools at a later age than men.

The issue here is not whether there is merit to her claim that there is an age criterion, or whether if such a criterion exists it has an adverse impact on women, or whether such a policy discriminates unlawfully against women.[5]

5. The record here shows no disparate impact on women. Over the four year period 1972-1975, 18.1% of the applicants and 18.3% of the entering classes have been female at The University of Chicago Medical School. 559 F. 2d at 1067; App. 26.

A study by the Association of American Medical Colleges under an HEW grant discloses that for the 1976-77 first-year medical class nationally, the mean age of all applicants was 24.1 for men and 24.3 for women. Although a greater percentage of younger than older applicants of both sexes were accepted, older female

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We contend that these questions are for HEW to decide both as a matter of clear congressional intent expressed through an unambiguous statute and as a matter of policy. Whether HEW jurisdiction is considered exclusive or primary it cannot be concurrent.

Our concern here is not that either of the respondent schools may be required ultimately to accept petitioner despite her relatively poor academic qualifications.[6]

Our concern, rather, is the forum in which and the procedure by which these schools must defend their admissions decisions. If petitioner has access to the federal courts independent of the administrative procedure and review provisions of Title IX, then so does any disappointed applicant, male or female.[7] A claim

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applicants had the advantage over older male applicants at each age bracket. Thus in the age 28-31 bracket, 28.9% of the female applicants and 22.0% of the male applicants were accepted; age 32-37, 23.6% of the female applicants and 16.1% of the male applicants were accepted; age 38 and over, 14.6% of the female applicants and 8.1% of the male applicants were accepted. Of the total applicants, 10.04% of the male applicants and 5.5% of the male acceptances were over 28; 13.09% of the female applicants and 9.05% of the female acceptances were over 28. Descriptive Study of Medical School Applicants, 1976-77, Association of American Medical Colleges, December, 1977 (HEW Contract No. 231-76-0011), 16.

6. We do not concede the existence of an age policy, any disparate impact on women in respondents' admissions policies or practices, and certainly do not concede the "but for" test as did the University of California Medical School at Davis in *Bakke*. There the school conceded it could not prove that Allan Bakke would not have been admitted in the absence of the special admissions program. *Bakke*, 98 S. Ct. at 2743.

7. Stephen Horn, the Vice Chairman of the U. S. Civil Rights Commission, put the matter succinctly:

> If Federal law were to provide individuals the opportunity to challenge each admissions decision made by a medical school on the basis of discrimination because of age, these institutions, which are now making necessary, careful and discerning selections without regard to age, are likely to have civil actions filed against them by disappointed applicants who fall beyond

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of discrimination under Title VI of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972 is easily made, however meritorious or groundless. And once in court, the plaintiff has available full discovery. The admissions committees may be deposed; the records of all applicants may be examined. However the burden is placed, the judiciary is fully implicated.

"The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 98 S. Ct. at 2760. This freedom is seriously threatened if admissions decisions are subject to judicial inquiry on a case-by-case basis at the behest of disappointed applicants who, like petitioner here, cannot accept the fact that others were better qualified.

An individual admissions decision cannot be reviewed in isolation. Courts would be required to make comparisons involving the objective or quantifiable credentials of thousands of unsuccessful as well as successful applicants. Many of the criteria are subjective or non-quantifiable. See, for example, the Harvard College Admissions Program set out in *Bakke*, 98 S. Ct. at 2764-66.

The University of Chicago Pritzker School of Medicine "strives to make its decision on the basis of the ability, achievement, personality, character, and motivation of the candidates." Its admission procedure involves "a preliminary screening of all applicants on the basis of their intellectual qualifications."[8]

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> the mean age of the applicant pool. Even though most, if not all, such actions will demonstrate that the adverse decision was not based upon age but upon other criteria, the expenditure of both human and financial resources in defending against such actions will exact a heavy toll and will not serve the public interest.

The Age Discrimination Study, U. S. Commission on Civil Rights (December, 1977), 107.

8. Petitioner's application was eliminated at this preliminary screening. App. 26.

From the group that passes this screening,

> final selection is made on the basis of the personal qualifications of the applicants. Honesty, intellectual curiosity, imagination, cooperativeness, friendliness, and a willingness to work long hours are a few of the desired qualities . . . Since no tests can measure adequately the personal qualifications of an applicant, the Committee relies heavily upon the reports from premedical committees, premedical advisors, instructors, and others who may know the student well and who write on his behalf. The proper selection of applicants is of significance not only to the University of Chicago but to the public as well. App. 33.

If the admissions committees of graduate schools must justify the application of these criteria in individual law suits the danger is great that student bodies will be selected on the basis of quantifiable factors alone. This result would be contrary to this Court's recognition in *Bakke* that universities must be given the discretion to determine and weigh those factors they consider appropriate in the selection of their student bodies. Furthermore, selection on the basis of quantifiable factors alone is antithetical to the achievement of diversity recognized as a desired goal by this Court in *Bakke*.[9]

9. The U. S. Commission on Civil Rights has described with approval the reliance on non-quantifiable factors by most medical schools in its June 1978 Report "Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools" (at 52):

> In sum, admissions based solely on quantifiable indicators appear to be the exception at the majority of law and medical schools throughout the United States. More than two-thirds of all American law schools specifically state that admissions decisions are based on factors beyond grades and test scores. The 117 medical schools emphasize, without exception, that admissions are not based on quantifiable factors alone—character, personality, age, residence, general health, recommendations, background (geographic, economic, ethnic, or racial), and extracurricular activities are among other areas of consideration. Most schools choose to employ the admissions process as an effort to come to a broader understanding of the applicant as both a student and a member of society. See also *id.* at 38-39.

If petitioner's view were to prevail, the answer to Justice Blackmun's question—"Among the qualified, how does one choose?"—is that the trial judge chooses.

We do not claim these schools or other private graduate schools are immune from scrutiny. But claims of discrimination in admissions policies should not be settled on a case-by-case basis by federal judges.[10] This is not the plan of Title VI or Title IX. The statutory procedure is investigation, conciliation, compromise and voluntary compliance. The procedure preserves the right of the school to challenge adverse agency findings through judicial review and ultimately to reject federal financial assistance if matters of overriding principle are involved.[11] Titles

10. Title IX, of course, covers more than admissions policies. Thus, if the judiciary were to become involved it would be obliged to review such matters as grades, class advancement, and even child care facilities for students with children. See, e.g., *De La Cruz* v. *Tormey*, No. 76-3355 (9th Cir. Sept. 13, 1978).

11. The brief for the federal respondents criticizes the statement in Justice White's concurring opinion in *Bakke* that even if private suits were permitted under Title VI and a court held a practice to be discriminatory, the recipient of federal funds would have the choice of ending the discriminatory practice or refusing the federal funding. 98 S. Ct. at 2798. Justice White's view was that permitting a private right of action would circumvent the procedural requirements precedent to terminating federal funding under Title VI (and by implication under Title IX). "This analysis," argue the federal respondents, "ignores the personal relief that may be awarded in a private suit under Title VI or Title IX, without regard for whether the recipient of federal funds chooses to accept or reject such funds in the future. In this case, for example, if petitioner proves the sex discrimination she has alleged, the district court may order her admission to medical school, even if the University of Chicago and Northwestern University never accept another penny of federal aid." Fed. Resp. Br. 55.

This conclusion is inconsistent with the intent of Title VI: "Sometimes those eligible for Federal assistance may elect to reject such aid, unwilling to agree to a non-discrimination requirement. If they choose that course, the responsibility is theirs." Sen. Ribicoff, 110 Cong. Rec. 7067.

A similar option was recognized in *Rosado* v. *Wyman*, 397 U. S. 397 (1970) (discussed below, n. 24). There this Court held the district court correctly concluded that New York State's Aid to

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VI and IX do not contemplate that a student body will be determined by injunction.

Academic freedom—"a special concern of the First Amendment"—is the ultimate issue. Justice Powell, *Bakke*, 98 S. Ct. at 2760. ". . . [I]nterference by the judiciary must be the rare exception and not the rule." Justice Blackmun, *Bakke*, 98 S. Ct. at 2807.

II.

TITLE IX DOES NOT PROVIDE AN INDEPENDENT PRIVATE RIGHT OF ACTION: IMPLICATION OF SUCH A RIGHT IS INCONSISTENT WITH ITS TERMS, PURPOSE AND HISTORY.

We agree with petitioner that Title IX of the Education Amendments of 1972 was patterned after Title VI of the Civil Rights Act of 1964—the statute considered by the Court in *Bakke*. Their texts are virtually identical; the proposers of Title IX said it was based on Title VI, and no doubt the draft of the bill started as a photocopy of Title VI. Pet. Br. 8. We agree that the legislative history of Title VI is highly relevant to a consideration of the meaning and intent of Title IX. If there is an independent private right of action under Title VI there is also one under Title IX.

We simply disagree with petitioner's claim that Title VI created an independent private right of action.

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Families with Dependent Children did not meet the requirements of the federal statute under which funding was provided. The district court had enjoined the State from reducing the payments. With respect to the remedy, this Court pointed out that "New York is, of course, in no way prohibited from using only *state* funds according to whatever plan it chooses. . . . [P]etitioners are entitled to declaratory relief and an appropriate injunction by the District Court against the payment of *federal* monies according to the new schedules, should the State not develop a conforming plan within a reasonable period of time. 397 U. S. at 420. (The Court's emphasis.)

A. The Terms of the Statute.

Petitioner and *amici* supporting her read both Titles VI and IX as though they included only their first sections: § 601 of Title VI, 42 U. S. C. § 2000d and § 901 of Title IX, 20 U. S. C. § 1681. In fact, in the Statutes Involved sections of petitioner's and federal respondents' briefs, reference is made only to § 901.[12]

But it is "fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.' " *Richards* v. *United States*, 369 U. S. 1, 11 (1961).

The first section of each Title (§ 601 of Title VI and § 901 of Title IX) declares the policy that no person shall be subjected to discrimination under programs receiving federal financial assistance—on the ground of race, color or national origin under Title VI and on the basis of sex in Title IX. Title VI applies to all programs; Title IX is limited to educational programs.

The second section (§ 602 and § 902) provides that the federal agency extending the financial assistance "is authorized and directed to effectuate the provisions of [§ 601 or § 901] . . . by issuing rules, regulations or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance . . ." Failure to comply with any requirement adopted by the agency may result in termination of financial assistance "after opportunity for hearing." No action to terminate may be taken, however, unless "compliance cannot be secured by voluntary means." In the event of termination of financial assistance, the agency is re-

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12. The relevant portions of Titles VI and IX are set out as an appendix to this brief.

quired to file a report with the appropriate congressional committee "of the circumstances and the grounds for such action."

The third section (§ 603 and § 903) of each title provides for judicial review of agency action taken under the second section. "Any department or agency action taken pursuant to [§ 602 or § 902] of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds."

We submit that a straightforward reading of the full Title clearly shows that the policy declared in the first section is to be effectuated by the agency responsible for funding, that compliance is to be sought by the agency through voluntary means and, failing this, funding is to be terminated. Any action the agency takes is subject to judicial review. This is the means of enforcement.

Nothing here suggests, explicitly or implicitly, an intent to create an independent private right of action. Rather a plain reading of the statute shows the reverse. Else why the careful spelling out of the enforcement procedure and the provision for judicial review of "any agency action."

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *National Railroad Passenger Corp.* [*Amtrak*] v. *National Ass'n of Railroad Passengers*, 414 U. S. 453, 458 (1974), citing *Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289 (1929).[13]

13. See also *Santa Clara Pueblo* v. *Martinez*, 98 S. Ct. 1670, 1679 (1978); *Goldman* v. *First Federal Savings & Loan Ass'n of Wilmette*, 518 F. 2d 1247, 1250 n. 6 (7th Cir. 1975):

> "If the statute expressly authorizes proceedings to enforce its provisions and the regulations promulgated under it, ordinarily it will be inferred that no other means of enforcement, such as by private cause of action, was intended by the legislature." [Citations omitted.] (per Judge, now Justice, Stevens.)

Petitioner and her *amici* argue that such a reading leaves a complainant without remedy; that the first section created "personal rights" and this implies the right to assert the "right" independent of the administrative enforcement procedure.

The argument assumes its answer. The "right" created is defined by the statute which creates it. If the statute, read as a whole, does not contemplate an independent right of action, then no such right can be drawn from one section alone.

The National Labor Relations Act provides in section 7 (29 U. S. C. § 157) that—

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

This, too, is a "personal right." But it has never been suggested that an employee terminated because he was trying to bring a union into a plant had an independent cause of action against the employer. The administrative procedure under the NLRA limits the scope of this "right", and resort to the processes of the National Labor Relations Board is the only means of its enforcement. See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261 (1940).

The remedy under Titles VI and IX lies in the administrative procedure created under these statutes. Complaint may be made to the funding agency, conciliation and voluntary compliance may be sought, and the agency has the ultimate power to terminate the financial assistance.[14]

14. HEW regulations provide that a person claiming to be subjected to discrimination may file a complaint with HEW within 180 days of the alleged discrimination, a period which may be extended by HEW. 45 C. F. R. § 80.7(b). HEW is to promptly investigate the complaint, and must attempt to resolve the matter by informal

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That this remedy may not be all that petitioner desires is irrelevant; it is what Congress provided. Petitioner has recognized the efficacy of the administrative procedure, having invoked it, and having asked the trial court and this Court to require HEW to carry out its statutory obligation respecting her administrative complaint. App. 19. "If there is no private right of action against the schools under Title IX, there must be recourse against HEW for the exclusive remedy it must provide thereunder." Pet. Br. 20.[15]

B. The Civil Rights Act of 1964.

The failure of Congress to provide a private right of action in Title VI—and by imputation in Title IX of the Education Amendments—was not an oversight.

Title VI was adopted as part of the Civil Rights Act of 1964, Pub. Law. 88-352, 78 Stat. 241. Other Titles of the Act cover voting rights (Title I), public accommodations (Title II), public facilities (Title III), public education (Title IV), and equal employment opportunity (Title VII). Title V relates to the Commission on Civil Rights; Title VIII to registration and voting statistics; Title IX to intervention and procedure after removal in civil rights cases; Title X establishes a community relations service. The final title, Title XI, miscellaneous, relates primarily to contempt and the authority of the Attorney General to institute proceedings.

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means. 45 C. F. R. § 80.7(c), (d)(1). The complainant is notified if the investigation does not warrant action (45 C. F. R. § 80.7 (d)(2)); if the matter proceeds to hearing, "the complainant . . . shall be advised of the time and place of the hearing" (45 C. F. R. § 80.9(a)), and may petition for participation in the hearing as amicus. 45 C. F. R. § 81.23.

15. Both respondent schools have provided HEW with all data requested by it in connection with its investigation of petitioner's administrative complaint. The Court of Appeals was so advised during the course of oral argument in June 1976. HEW has stated that it has completed its on-site investigation. Cert. Pet. A-35.

An examination of the full Civil Rights Act clearly shows that the enforcement procedures were carefully thought out Title by Title. Provision for a right of action by the "person aggrieved" is made under certain of its Titles and not others: the Attorney General is authorized to institute suit in certain limited circumstances, and any pre-existing right of private action on constitutional grounds is specifically preserved against the presumption that if not expressed it might be abrogated. No provision for action either by the Attorney General or by the "person aggrieved" is found under Title VI—only an administrative remedy.

Title I, voting rights, makes express provision for suits by the Attorney General in the event of violation. 42 U. S. C. § 1971(c). Section 1971(d) also provides that "district courts . . . shall have jurisdiction of proceedings instituted pursuant to this section . . . without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."

Title II, discrimination in places of public accommodation, expressly provides that any "person aggrieved" may institute "a civil action for preventive relief," and intervention by the Attorney General is permitted if the case is of "general public importance." 42 U. S. C. § 2000a-3. The Attorney General may initiate the suit if he believes there is a "pattern or practice of resistance." § 2000a-5.

Title III, desegregation of public facilities, also makes specific provision for suit by the Attorney General. 42 U. S. C. § 2000b. Since the Title covers public facilities "owned, operated, or managed by or on behalf of any State or subdivision thereof other than a public school or public college," and thus would also be subject to private suit as state action under 42 U. S. C. § 1983 (the Civil Rights Act of 1871), Title III also provides: "Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in any facility covered by this title." 42 U. S. C. § 2000b-2.

Title IV, desegregation of public education, provides judicial remedies similar to Title III. Suits by the Attorney General are specifically sanctioned, and the right of the individual to bring suit is expressly preserved. 42 U. S. C. §§ 2000c-6, 2000c-8.

Title VII, equal employment opportunity, establishes an administrative procedure before the Equal Employment Opportunity Commission and then a trial de novo within a specified period after the administrative agency terminates its role. ". . . [A] civil action may be brought . . . by the person claiming to be aggrieved. . . . Each United States district court . . . shall have jurisdiction of actions brought under this title." 42 U. S. C. § 2000e-5(f)(1) and (3).

Title IX of the 1964 Civil Rights Act—intervention and procedure after removal—permits intervention by the Attorney General in any action claiming denial of equal protection under the Fourteenth Amendment if he considers it of "general public importance." 42 U. S. C. § 2000h-2.

It is Title VI alone of the non-discrimination titles of the 1964 Civil Rights Act which makes no provision either for a right of action by the "person aggrieved" or for intervention or initiation of suit by the Attorney General. Only Title VI provides for an administrative procedure "to effectuate the provisions of . . . this title." Only Title VI provides for judicial review after agency action. 42 U. S. C. §§ 2000d-1, 2000d-2.

In short, when Congress adopted the Civil Rights Act of 1964 it did not intend that Title VI included a private right of action.[16]

16. Petitioner turns the argument around. Since Congress provided an express right of action under Title II—public accommodations—and Title VII—employment—it would have been an "outrage" and "unthinkable" not to do the same under Titles VI and IX. Pet. Br. 16. Describing what Congress did in pejorative terms does not advance the argument.

Unlike Titles II and VII, Titles VI and IX were based by Congress not upon the broad Commerce Clause but on the narrower

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C. Legislative History.

The course of Titles VI and IX through the legislature supports the conclusion that no independent private right of action was intended; that the first section—601 of Title VI and 901 of Title IX—was a statement of policy to be enforced through the procedures of Sections 602 and 902.

1. Title VI.

The clearest evidence that no private right of action was intended comes from statements of the bill's primary sponsors. Justice White has pointed out in *Bakke* that an effort was ini-

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ground that the government has the right to fix the terms under which federal funds are allotted. See, e.g., Remarks of Senator Humphrey at 110 Cong. Rec. 6546.

For this reason, Executive Order 11246 is more analogous to Titles VI and IX. The Order, prohibiting employment discrimination on the basis of race, color, religion, sex or national origin by those doing business with the federal government, with its accompanying regulations, establishes an administrative scheme similar to Title IX—investigation, conciliation, hearing, and ultimately, termination of government contracts. Educational institutions, such as the respondents here, are subject to its provisions. Although the federal agencies responsible for enforcement of E. O. 11246 may be judicially compelled to carry out the Order, a private right of action against the contractor alleging violation of the Order may not be maintained. *Cohen* v. *I. I. T.*, 524 F. 2d 818, 822 n. 4 (7th Cir. 1975), *cert. denied* 425 U. S. 943 (1976); *Farmer* v. *Philadelphia Electric Co.*, 329 F. 2d 3, 9 (3d Cir. 1964); *Gnotta* v. *United States*, 415 F. 2d 1271 (8th Cir. 1969) *cert. denied* 397 U. S. 934 (1970); *Farkas* v. *Texas Instruments, Inc.*, 375 F. 2d 629 (5th Cir.), *cert. denied* 389 U. S. 977 (1967); *Legal Aid Society of Alameda County* v. *Brennan*, 381 F. Supp. 125 (N. D. Cal. 1974).

That it is only educational institutions receiving federal funds which are covered by Title IX may also reflect congressional intent to interfere as little as possible in an area where the interests of academic freedom and its First Amendment implications place the legislation on a different footing from Titles II and VII. The amici brief of the Federation of Organizations for Professional Women, et al. makes this point at 12, 13 n. 3. See also Fed. Resp. Br. 19.

tially made to include such a provision but it was unsuccessful. *Bakke*, 98 S. Ct. at 2797.[17]

The statement of Senator Keating, one of the principal sponsors of Title VI, is particularly significant. Justice Stevens concluded in *Bakke* that the right of an individual to maintain a private right of action "is amply supported in the legislative history of Title VI itself." In support, a statement of Senator Ribicoff was cited to the effect that action to end discrimination is preferable to action to end the payment of funds. *Bakke*, 98 S. Ct. at 2815 n. 28. As we show later in this section, this comment when read in context does not support any conclusion as to the procedure to end discrimination.

In any event, during the course of a lengthy presentation by Senator Ribicoff, and shortly after he made the comment referred to above, Senator Ribicoff yielded the Senate floor to Senator Keating, who then said (110 Cong. Rec. 7065):

> "As Senator RIBICOFF has pointed out, both he and I felt that the original title VI proposal was objectionable in that it emphasized the cutting off of Federal funds rather than the ending of discrimination. We favored a provision allowing the administrator to institute a civil action to eliminate the discrimination and we favored judicial review of the determination to withhold Federal funds.
>
> "Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, *we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill.* However, both the Senator from Connecticut and I are grateful that our other suggestions were adopted by the Justice Department." (Emphasis added.)[18]

17. An earlier rejected version of the bill providing for an independent right of action is discussed in the "Minority Report upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H. R. 7152", House Report No. 914 of the 88th Congress, 1st Session at 86.

On the House side, Representative Celler assured:

> Actually, *no action whatsoever* can be taken against anyone until the Federal agency involved has advised the appropriate person of his failure to comply with nondiscrimination requirements and until voluntary efforts to secure compliance have failed. 110 Cong. Rec. 1519. (Emphasis added.)

The correlation between sections 601 and 602 was clearly articulated:

> SENATOR HUMPHREY: Section 602 is the implementing section to the general policy laid down in Section 601. (110 Cong. Rec. 8978.)

Again—

> SENATOR HUMPHREY: First of all, section 601 states general policy. Section 602 states the means of effectuating that general policy, the implementation and the exclusion. (110 Cong. Rec. 13378.)

When an amendment was proposed relating to the exclusion of deposit and loan insurance and guarantees referred to by Senator Humphrey, Senator Pastore, another sponsor of Title VI, commented:

> Mr. President, frankly, I think what we are beginning to do is kick a dead horse. The trouble with the sponsors of the present amendment is that they are not reading Title VI as a whole . . .
>
> Section 602 is just as much a part of Title VI as is section 601. Section 601 is a statement of policy. Section 602 is the section that gives authority to the agencies . . . (110 Cong. Rec. 13435.)

18. See also comments of Sen. Kuchel, 110 Cong. Rec. 6562, and Rep. Gill, 110 Cong. Rec. 2467.

Senator Javits questioned Senator Humphrey:

> SENATOR JAVITS: So my first question is whether the able Senator from Minnesota understands very clearly that sections 601 and 602 . . . establish policy and provide for the carrying out of that policy, which would require the HEW administrators to act with respect to programs which are segregated . . .
>
> SENATOR HUMPHREY: The Senator's interpretation of section 601 and section 602 is proper and correct. (110 Cong Rec. 12719.)[19]

Petitioner and *amici* argue that the purpose of Title VI (and presumably Title IX) was to end discrimination—not to cut off federal financial assistance. We agree. The dispute is not in the purpose but in the means of effectuating the non-discrimination policy established in the first section of Titles VI and IX.

Again Senator Humphrey, one of the principal architects of the Civil Rights Act of 1964, spoke to this:

> Termination of assistance, however, is not the objective of the title—I underscore this point—it is a last resort to be used only if all else fails to achieve the real objective, the elimination of discrimination in the use and receipt of Federal funds. This fact deserves the greatest possible emphasis: *Cutoff of Federal funds is seen as a last resort, when all voluntary means have failed.* (110 Cong. Rec. 6544.) (Emphasis added.)

Senator Pastore made the same point:

> When we read these two pages, we understand that the whole philosophy of title VI is to promote voluntary compliance. It is written right in the law. There shall be the voluntary compliance as the first step. . . . (110 Cong. Rec. 13334.)[20]

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19. The same point is made repeatedly. See 110 Cong. Rec. 5091, 8978, 13333, 13378.

20. See also 110 Cong. Rec. 6048, 6546, 12720, 13333.

Senator Proxmire reviewed the various procedural steps built into the Title. He summarized:

> That means that if there is discrimination in a Federal program, first a complaint must be made to the department. For example, it might be the Department of Health, Education and Welfare. The Secretary of the Department of Health, Education and Welfare must then devote days, weeks, and perhaps months *in an effort to secure a voluntary agreement which would end the discrimination.* (110 Cong. Rec. 8345.) (Emphasis added.)

The statement of Senator Ribicoff previously referred to came in the midst of a full explanation by him of Title VI. He explained how he and Senator Keating had introduced amendments to improve the original bill and defined their purpose:

> The junior Senator from New York and I wanted to be sure that administrators of Federal programs were under an obligation to take action to end discrimination in the programs under their jurisdiction. We wanted to be sure they had a choice of remedies, with cutoff of funds to be used only as a last resort. Finally, we wanted to be sure that proper procedures, including judicial review, were followed. (110 Cong. Rec. 7065.)

This statement, following within paragraphs of the statement relied upon by Justice Stevens, makes crystal clear that although the primary goal was to end discrimination, this was to be achieved by the administrators of funding agencies under the "proper procedures, including judicial review" found in Section 602.

Senator Ribicoff went on clearly and succinctly to describe the purpose and procedure for enforcement of Title VI. The first section, he explained, "would establish the basic principle that no person is to be discriminated against because of race, color, or national origin" under any federally assisted program. "Section 602 then *would establish the procedure to be followed by executive agencies in implementing the non-discrimination requirements of Section 601.*" (Emphasis added.) He detailed the pro-

cedural steps which were necessary. The fourth step was "The agency must then determine that compliance could be secured by voluntary means." 110 Cong. Rec. 7066.

In reference to the provision of section 602 that compliance could be effectuated "by any other means authorized by law," Senator Ribicoff explained that this referred to possible action by the Attorney General under *Title IV* (not VI) to institute a lawsuit "if the recipient were a school district or public college." He described other possible agency action. *Id.*

He summarized his review: "That is the procedure of Title VI. It is fair and reasonable." 110 Cong. Rec. 7066.

Nowhere did Senator Ribicoff or any other legislator in explanation of Title VI claim or suggest at any time that a possible means of enforcement was an action by the "person aggrieved," other than to state that this was considered but not included, as did Senator Keating. *See, e.g.*, remarks of Senator Pastore, 110 Cong. Rec. 7063; Senator Humphrey, 110 Cong. Rec. 6545-46; Rep. Celler, 110 Cong. Rec. 2468.

It is simply clear beyond dispute that Title VI created no independent private right of action. The meaning of the Act is plain, it is unambiguous and allows of no interpretation other than that the administrative procedure established under its terms, with subsequent judicial review, is the exclusive means of enforcement.[21]

21. The U. S. Civil Rights Commission, which has oversight authority on enforcement of civil rights statutes, advises persons who claim discrimination under Title VI to file a complaint with the agency involved, and if the discrimination is in the area of employment, advises that charges be filed with the Equal Employment Opportunity Commission under Title VII or the appropriate state or local fair employment practice agency. With respect to private litigation, the Commission states: "If the recipient is a public institution, such as a public hospital or a public school, the appropriate legal action may be a civil rights suit to secure a court order barring the unlawful practices under Title III or IV, respectively, of the Civil Rights Act of 1964." There is no mention of a private right of action as a possible remedy under Title VI. See Civil Rights Under Federal Programs—An Analysis of Title VI of the Civil Rights Act of 1964. U. S. Commission on Civil Rights, Clearinghouse Publication No. 1, pp. 12-13 (1968).

2. Title IX.

The bill which ultimately became Title IX of the Education Amendments of 1972 was proposed in 1971 by Senator Bayh, its chief sponsor.

Senator Bayh introduced the bill on August 6, 1971. It was then in substantially the same form—insofar as here relevant—as when it was finally adopted in 1972. He explained at the time of introduction (117 Cong. Rec. 30404):

> Sections 602-604 [Secs. 902 and 903 of Title IX as finally adopted] *contain enforcement, judicial review, and other technical provisions for the implementation of the section 601 [901] prohibition.* These provisions are similar to those provided under title VI of the 1964 Civil Rights Act—forbidding discrimination in federally assisted programs—which does not presently include a prohibition on sex discrimination. (Emphasis added.)

There is no suggestion here of enforcement through direct suit by the "person aggrieved."

The subject of direct judicial intervention was not overlooked by Senator Bayh at this time. One section of the bill, ultimately adopted as Section 906 of Title IX (Public Law 92-318, 86 Stat. 375), amended Titles IV and IX of the original Civil Rights Act of 1964.[22] The purpose of the amendment was to allow for suits by the Attorney General in the event of sex discrimination in public schools and in suits for violation of Fourteenth Amendment rights on account of sex as well as race, color, religion or national origin. These amendments were necessary, explained Senator Bayh, so that the "Attorney General can initiate legal proceedings on behalf of individuals alleging that they have 'been denied admission to or not permitted to

22. Title IV of the 1964 Act is 42 U. S. C. § 2000c, *et seq.* Title IX of the 1964 Act was the "intervention" title of that Act, and is 42 U. S. C. § 2000h, *et seq.* The sections amended by Section 906 of the 1972 Act are 42 U. S. C. § 2000c-6 and 42 U. S. C. § 2000h-2.

continue in attendance at a *public* college.'" 117 Cong. Rec. 30404. (Emphasis added.)

The necessity to amend other titles of the Civil Rights Act to permit suits by the Attorney General in cases of sex discrimination in public institutions or to permit intervention by the Attorney General in suits for deprivation of constitutional rights is completely inconsistent with the theory that the new bill already allowed private suits as a means of enforcement.

Senator Dominick was concerned about the apparent absence of provision for a formal hearing on a charge of discrimination. This colloquy followed (117 Cong. Rec. 30407-08 (1971)):

> MR. BAYH. This is identical language, specifically taken from title VI of the 1964 Civil Rights Act, Public Law 88-352.
>
> MR. DOMINICK. Right; I understand that.
>
> MR. BAYH. *This title does require hearings and notice, and the normal administrative procedures are set out.*
>
> MR. DOMINICK. Then the Senator is, in effect, contending that there would be hearings and the right to be heard and all the usual procedures along that line?
>
> MR. BAYH. The same procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder would *be equally applicable to discrimination in this respect.* (Emphasis added.)

On February 28, 1972, Senator Bayh again introduced the bill which ultimately became Title IX. 118 Cong. Rec. 5802. Senator Bayh again discussed the need to amend other titles of the 1964 Civil Rights Act to allow for direct judicial intervention. He explained (118 Cong. Rec. 5808):

> There are, of course, other loopholes in the Civil Rights Act [of 1964] where sex was not mentioned. To correct one more, this amendment would permit the Attorney General to initiate litigation concerning the denial on the basis of sex of admission to or continued attendance at *a public college*, and to intervene in litigation already commenced by others regarding the denial of *equal protection* of the laws on the basis of sex. (Emphasis added.)[23]

What is thus clearly not provided by the 1964 Civil Rights Act or by Title IX of the Education Amendments of 1972 is a suit by the Attorney General or a suit by the "person aggrieved" against a private institution where there is no state action and thus not within the purview of the Fourteenth Amendment or 42 U. S. C. § 1983.

In sum, Titles VI and IX by their terms provide a procedure for enforcement of the non-discrimination policy they enunciate. The absence of a provision for an independent private right of action was not inadvertent as both the specific inclusion of such

23. *Amici* National Urban League, et al., argue that the decision below creates a "two-tiered" enforcement scheme, one for public institutions with direct access to the courts, and another for private institutions where the administrative procedure would have to be followed. *Amici* Br. 3. Petitioner makes the same point, contending that "the identical legislative scheme cannot mean one thing in the case of a state program and something else in the case of other programs." Pet. Br. 15.

There is, of course, a "two-tiered" system, but not because Titles VI or IX are to be applied in different ways depending on the private or public nature of the school. The difference is that 42 U. S. C. § 1983 and the Fourteenth Amendment do not apply to private schools. Jurisdiction existed in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), long before Title VI was enacted. The violation claimed in *DeFunis* v. *Odegaard,* 416 U. S. 312 (1974) was of the Equal Protection Clause of the Fourteenth Amendment, not Title VI. *Bakke* would still have arisen even if there had been no Title VI because the University of California is a state school. Furthermore, the "two-tiered" system of enforcement was clearly intended by Congress in enacting the Civil Rights Act of 1964 and in Title IX itself. Title IV, for example, specifically provides for Attorney General suits to enforce nondiscrimination in *public* schools only. And in discussing Title VI, proponents mentioned the distinction with approval in explaining how the "other means" language of Title VI would work. (See Remarks of Sen. Ribicoff, 110 Cong. Rec. at 13130 and Sen. Humphrey at 110 Cong. Rec. 8979). With respect to undergraduate schools, Title IX distinguishes between public and private schools, and applies only to "public institutions of undergraduate higher education." § 901(1).

a remedy in other titles of the Civil Rights Act of 1964 and the legislative history of both Titles attest.

The Court of Appeals correctly applied the *Cort* v. *Ash*, 422 U. S. 66 (1975) tests in concluding that "implication of a private judicial remedy would be inconsistent with the legislative intent and underlying purposes of the statutory scheme." The Court added: "Congress's express provision of a sophisticated scheme of administrative enforcement should be construed as an indication of an implicit legislative intent to exclude any private judicial remedies for violations of Title IX other than the judicial review mechanism Congress made available to private parties in the statute." 559 F. 2d at 1080, 1082; Cert. Pet. A-29, 32.[24]

24. Many of the *amici* cite *Rosado* v. *Wyman*, 397 U. S. 397 (1970) and *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969) as supporting a Title IX private right of action. In *Rosado*, the issue was whether a New York statute relating to calculation of benefits under its federally supported Aid to Families with Dependent Children program was consistent with a provision of the federal Social Security Act requiring certain adjustment factors to be considered by the states in their AFDC programs. HEW had authority to determine whether states were in compliance. The argument was made that the HEW procedure precluded a private action challenging the New York law. The Court upheld the action. The Court found there was no procedure for welfare recipients to trigger and participate in the HEW proceeding. It also concluded that the legislative history was unclear. ". . . Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding." *Id.*, at 406, 412. Neither circumstance pertains here. The discriminatee under Title VI or Title IX may invoke the administrative procedure, may be allowed to participate, and may have judicial review of final agency action. *Rosado* was distinguished on this ground in *Crawford* v. *University of North Carolina*, 440 F. Supp. 1047, 1057-58 (M. D. N. C. 1977) and *Mendoza* v. *Levine*, 412 F. Supp. 1105, 1108-9 (S. D. N. Y. 1976). And here, of course, Senators Humphrey, Ribicoff, Keating and Pastore did not mute their voices.

Although the federal respondents lay great stress on *Allen* (Fed. Resp. Br. 10), its relevance is not apparent. There the Voting Rights Act of 1965 was under scrutiny. Section 5 of the Act provided that any State Act relating to voting qualifications or prerequisites to voting or standard voting practice or procedure, could not take effect

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D. Exhaustion of Remedies.

Sections 603 and 903 of Titles VI and IX provide for "such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." The Court of Appeals below held that this review mechanism was made available by Congress to private parties. 559 F. 2d at 1082; Cert. Pet. A-32.

In any event, and apart from the judicial review provisions of Sections 603 and 903, under the doctrine of exhaustion of administrative remedies no judicial intervention would be appropriate until and after the agency—here HEW—has completed its investigation and review functions under Sections 602 or 902. The exhaustion doctrine has, in fact, been recognized in Title VI litigation and has been advanced by HEW itself. *E.g.*, *Johnson* v. *County of Chester*, 413 F. Supp. 1299, 1311 (E. D. Pa. 1976); *Feliciano* v. *Romney*, 363 F. Supp. 656 (S. D. N. Y. 1973).

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unless the State received a declaratory judgment from the District of Columbia district court or no formal objection from the Attorney General within a certain period after notice. The issue in *Allen* was whether a court other than the District of Columbia court could at the behest of private parties find that an Act was subject to the declaratory judgment or Attorney General procedures. In upholding the action, the Court distinguished between the declaratory action which could be brought only by the State in the District of Columbia to test the validity of the Act, and the action to determine whether the Act was within the purview of the Voting Rights Act and hence subject to the Voting Act procedures. "A declaratory judgment brought by the State pursuant to § 5 requires an adjudication that a new enactment does not have the purpose or effect of racial discrimination. However, a declaratory judgment action brought by a *private litigant* does not require the Court to reach this difficult substantive issue. The only issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement. The difference in the magnitude of these two issues suggests that Congress did not intend that both can be decided only by the District of Columbia District Court." 393 U. S. at 558-59. This hardly reaches the issue here. *Allen* may have relevance to whether HEW may be required to perform its statutory obligation, but not to the issue of whether HEW may be bypassed.

Lloyd v. *Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977) is cited by petitioner, her *amici*, and the federal respondents, as supporting a private right of action under 29 U. S. C. § 794, the Rehabilitation Act of 1973. There the statute included only the policy provision comparable to sections 601 and 901 and did not include the administrative enforcement features of section 602 and 902 of Titles VI and IX. The court specifically commented upon the exhaustion doctrine in that context (548 F. 2d at 1286 n. 29):

> And until effective enforcement regulations are promulgated, Section 504 [29 U. S. C. § 794] in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. . . . *But assuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to a posteriori judicial review.* (Emphasis added.)

The rationale for the judiciary staying its hand was succinctly expressed by this Court under the analogous primary jurisdiction doctrine in *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U. S. 800, 821 (1973):

> Ordinarily, then, a court should refrain from expressing a preliminary view on what national transportation policy permits, before the ICC expresses its view. But when a court issues an injunction pending final determination, one important element of its judgment is its estimate of the probability of ultimate success on the merits by the party challenging the agency action. Depending on the type of error the reviewing court finds in the administrative proceedings, *the issuance of an injunction pending further administrative action may indicate what the court believes is permitted by national transportation policy, prior to an expression by the Commission of its view. This is precisely what the doctrine of primary jurisdiction is designed to avoid.* The fact that issuing an injunction may undercut the policies served by the doctrine of primary jurisdiction is therefore an important element to be considered when a federal court contemplates such action. [Citations omitted.] (Emphasis added.)

The need for prior expression by HEW of its views of proper application of Titles VI and IX is even more compelling here than in *Atchison*.

Title VI (and by reference Title IX) were intended to be applied uniformly and on a national basis. The rules "must have broad scope. They must be national. They must apply to all 50 states." Senator Pastore, 110 Cong. Rec. 7059.

"Title VI has been so drawn and so devised as to provide uniformity of rules and regulations . . ." Senator Ribicoff, 110 Cong. Rec. 8423.

The enactment of Title VI "will thus serve to insure uniformity and permanence to the nondiscrimination policy." Senator Humphrey, 110 Cong. Rec. 12720.

"Title VI provides a uniform means of enforcement . . ." Senator Javits, 110 Cong. Rec. 7103.

Sections 602 and 902 require the agency to "effectuate the provisions of section 601 [section 901] . . . by issuing . . . orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

Petitioner's complaint here illustrates the necessity for the development of national policy through a uniform administrative procedure and the inappropriateness of a case-by-case approach. She claims the existence of an age criterion in the admissions policies of medical schools and has filed administrative complaints "against various medical schools in the State of Illinois," including the respondents here. Cert. Pet. A-35; App. 16.

Although we deny that age was a factor in the admissions decision concerning Ms. Cannon (App. 27), yet it is clear from other sources that there is concern about age as a valid criterion in medical school admissions.[25]

25. Upon the occasion of Allan Bakke's entry to the University of California Medical School at Davis this fall, the Chairman of

(Footnote continued on next page)

A resolution of the age discrimination claim requires a series of decisions—some judgmental, some factual—none of which are amenable to resolution in a case against two medical schools in Chicago. Is there in fact an age criterion in medical schools; if so, does this have a disparate impact on females; if there is an empirically demonstrable bias in admissions against older applicants, is there a gender-based differential; is a gender-based differential significant in light of the fact that HEW is also charged with enforcement of the Age Discrimination Act of 1975 which is analogous to Titles VI and IX; as a matter of policy, may medical schools take age into account—as does the Medical School of the University of California at Davis —"to assure maximum duration of practice."[26]

HEW told Ms. Cannon that the issues she raised are "of first impression and national in scope." She was advised that "national Office for Civil Rights policy must be developed," and that "the authority for formulating national policy rests in our Headquarters office." Cert. Pet. A-35.

(Footnote continued from preceding page.)

the Admissions Committee at Davis explained the decision of the school to deny his application in the first instance:

> First he was too old. Although we don't have an age limit, we do, because of the scarcity of physicians, like to get qualified applicants as young as possible to assure maximum duration of practice. We don't use age as a cutoff, but tend to look a lot harder at anyone past age 28 or 30. American Medical News, Sept. 15, 1978, p. 18.

The age issue is not limited to medical school admissions. In *Purdie* v. *The University of Utah, et al.*, Supreme Court of Utah, No. 15209 (Aug. 23, 1978), the Court sent back for an evidentiary hearing the issue of whether the state school's age criterion for admission to its department of Educational Psychology satisfied the rational basis test for a legitimate state purpose under the Fourteenth Amendment.

26. "Graduate admissions decisions, like those at the undergraduate level, are concerned with 'assessing the potential contributions to the society of each individual candidate following his or her graduation. . . .'" *Bakke*, 98 S. Ct. at 2761 n. 49, quoting from Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly (Sept. 26, 1977).

We concur. The issues are national in scope and national policy ought to be developed by the agency with the expertise and charged with the statutory responsibility to develop such a policy. It is not for the courts to declare the policy, at least not until the agency has acted.

The Court of Appeals correctly recognized that an independent private right of action was not the appropriate vehicle under these circumstances (559 F. 2d at 1074 n. 17; Cert. Pet. A-16):

> Another objection to the implication of a private remedy arises where Congress has delegated authority to an administrative agency to enforce the statute. Under the doctrine of primary jurisdiction a court has no jurisdiction to accept a case until the issues, requiring resolution of questions within the agency's area of expertise, have been reviewed by the agency with the special competence to deal with the problem. In this case we believe that the HEW is in a much better position to evaluate the statistics of the applicant and entering classes at the various medical schools. In addition, HEW has the benefit of comparing the local practice to the admission policies on a national level.

Although HEW contends in its brief in this case that private suits under Title IX "would raise no difficulties concerning exhaustion of administrative remedies" or "any primary jurisdiction problem" (Fed. Resp. Br. 58 n. 36), it has elsewhere well stated the reasons why a court should not intervene until after agency action.

In *Terry* v. *Methodist Hospital of Gary*, Civ. No. 76-373, N. D. Ind.), HEW requested the trial court to stay its hand pending the conclusion by HEW of the administrative process in a Title VI investigation. ". . . HEW should be allowed to fulfill its Title VI responsibilities, and exercise its expertise so that if a judicial determination need ever be made, it can be done on the basis of a thorough administrative record."

In describing its jurisdiction, HEW told the Indiana court:

> The doctrine of primary jurisdiction is closely aligned to that of exhaustion of administrative remedies. It constitutes a judicial recognition that in numerous situations, Congress has established a scheme whereby the expertise of an agency can be first exercised in order to avoid unnecessary litigation and to provide a record which the Court can review. Additionally, the agency can coordinate its decisions nationally so that consistent determinations can be made." Statement in Support of HEW Motion for Reconsideration, October 13, 1977, 6, 10.[27]

We respectfully submit that the doctrine of exhaustion militates against the implication of a private right of action.[28]

27. There is considerable confusion in HEW's position. As we have pointed out, HEW initially resisted the *Cannon* complaint, contending there was no independent private right of action. It later reversed its position without explanation and now insists there is a private right of action. Although no reason for the shift of position was offered the Court of Appeals, it now contends this was because of "communication lapses between national and regional HEW offices." Fed. Resp. Br. 6 n. 9. Its position on exhaustion and primary jurisdiction here is different from its position in *Methodist Hospital of Gary*. The national office of HEW and the Department of Justice, Washington were involved in that case. In *NAACP* v. *Wilmington Medical Center*, 453 F. Supp. 280, 300 (Del. 1978), still another position was taken: "The Secretary [of HEW] adhering to the position recently taken by the government before the Supreme Court in *Bakke* . . . concedes that a private action may be brought against a recipient of federal assistance under Title VI and Section 504, but contends that the plaintiffs in this case *elected to enforce their rights through the administrative process and therefore are entitled only to judicial review of administrative action.*" (Emphasis added.)

Ms. Cannon had filed an administrative complaint prior to instituting this suit and HEW had completed its on-site investigation. Cert. Pet. A-35. It is apparent that there is another communication lapse, since the HEW brief indicates a lack of awareness of the administrative complaint. HEW contends in its brief here that "the Court need not address itself to the various questions presented when an administrative investigation is under way . . . at the time a Title IX complaint is filed in district court." Fed. Resp. Br. 60 n. 36.

28. The doctrine is more properly that of exhaustion rather than primary jurisdiction since in our view there is no judicial jurisdiction until the administrative procedure is completed. See *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 433 (1939).

III.

THE SUBSEQUENT LEGISLATION AND PRIOR DECISIONS RELIED ON BY PETITIONER DO NOT SUPPORT AN INDEPENDENT PRIVATE RIGHT OF ACTION.

Petitioner claims that congressional intent to provide a private right of action under Title IX "has been affirmed by at least three subsequent declarations of Congress"—Section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794; the Age Discrimination Act of 1975, 42 U. S. C. § 6101; and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988 Pet. Br. 6-7. Similar contentions with respect to one or more of these statutes are made by the federal respondents and petitioner's *amici*.

Petitioner also argues that prior judicial decisions "expressly had construed Title VI to create a private right of action." Pet. Br. 8.

Although subsequent legislation has little relevance[29], petitioner's references do not support her claim. The cases cited by petitioner do not support a Title VI private right of action.

A. The Rehabilitation Act of 1973.

Petitioner refers to "congressional declarations that Title VI and Title IX 'permit a judicial remedy through a private action,' made in connection with amendment of the Rehabilitation Act of 1973 . . ." Pet. Br. 10. The reference is to an addendum to a Senate Report in support of the 1974 amendments to the 1973 Rehabilitation Act. Sen. Rep. No. 93-1297. 1974 U. S. Code Cong. and Ad. News 6390-91.

29. "The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight." *Teamsters* v. *United States*, 431 U. S. 324, 354 n. 39 (1977); "Legislative observations 10 years after passage of the Act are in no way part of the legislative history." *United Airlines* v. *McMann*, 434 U. S. 192, 200 n. 7 (1978).

The context in which the quotation from petitioner's brief appears discusses section 504 of the 1973 Act—a section not modified by the proposed 1974 amendments. The full text makes clear that section 504 "was patterned after . . . the anti-discrimination language of section 601 [of Title VI] . . . and section 901 [of Title IX]." The 1973 Act did not include the enforcement procedures of Titles VI and IX, *i.e.*, a provision comparable to sections 602 and 902 of Titles VI and IX. "It [the 1973 Rehabilitation Act] does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form and such regulations and enforcement are intended." The Report then described the intended, but not included, procedures which it expected HEW to complete. The relevant paragraph concluded with the sentence from which petitioner's quotation is extracted:

> This approach to implementation of section 504, which closely follows the models of the above cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action. 1974 U. S. Code Cong. and Ad. News 6391.

The full context makes clear that the judicial remedy referred to had to be a review of administrative action, not an independent private action, otherwise the preceding part of the sentence is meaningless.

That is precisely how this sentence was read in *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277, 1286 (7th Cir. 1977). There the Court quoted the full text from the Senate Report described above, including the final sentence. The Court then observed ". . . the above language contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action. . ." The Court went on to hold that until an administrative procedure was provided—something

the 1973 Rehabilitation Act did not do—it would permit an independent right of action. But after an enforcement procedure is promulgated, "the private cause of action under Section 504 should be limited to *a posteriori* judicial review." *Id.* at 1286 n. 29.[30]

We submit that the 1974 Report referred to by petitioner does not support petitioner's claim that it demonstrates congressional intent to provide an independent private right of action under Titles VI and IX.[31]

B. The Age Discrimination Act of The Older Americans Amendments of 1975.

The Act, 42 U. S. C. § 6101, *et seq.* generally prohibits discrimination on the basis of age in federally assisted programs. It contains provisions comparable but not identical to Titles VI and IX. Petitioner refers to a congressional declaration that "legislation patterned on Title VI contemplated a 'private right to such a remedy through civil suit' made in connection with the Age Discrimination Act," citing 1975 U. S. Code Cong. and Ad. News 1324. Pet. Br. 10.

The inner quote which purports to be from the referenced Report is misquoted; the sentence in which it appears has nothing to do with Title VI. The context in which the sentence appears is as follows:

> Neither the private right to seek a remedy through civil suit contemplated by the House bill nor the authority of the Attorney General to bring 'pattern and practice' actions contained therein is included in the conference substitute; thus implementation will proceed through a set of con-

30. Despite this unequivocal statement in *Lloyd*, petitioner and HEW cite it in support of the proposition that it recognizes a private right of action under the Rehabilitation Act and by analogy under Title IX. Pet. Br. 7 n. 4; Fed. Resp. Br. 38-39.

31. Section 504 has been amended as part of the Comprehensive Rehabilitation Services Amendments of 1978. P. L. 95-602. The amendment makes applicable to section 504 the "remedies, procedures, and rights set forth in Title VI."

sistent Federal regulations rather than a case by case method in the courts. Conference Report No. 94-670, 1975 U. S. Code Cong. and Ad. News 1324.

We simply do not understand how this supports petitioner's position.[32]

C. The Civil Rights Attorney's Fees Awards Act of 1976.

This Act was adopted after the initial decision by the Court of Appeals in this case and its adoption was the reason the Court granted rehearing on the Title IX issue.

The Act, now part of 42 U. S. C. § 1988, provides in part that in any action or proceeding to enforce Title IX, among other statutes, the court may in its discretion allow the prevailing party a reasonable attorney's fee as part of its costs.

This Act, contends petitioner, confirms congressional understanding that Title IX is privately enforceable. Pet. Br. 9.

However, as the opinion of the Court below on rehearing thoroughly explained, the legislative history of the Attorney's Fees Awards Act did not attempt to define which prior legislation provided for a private right of action, but rather to provide

32. The Age Discrimination Act has also been the subject of recent congressional amendment. P. L. 95-478. The House amendments attempted to provide an independent private right of action. H. R. 12255. The purpose was explained: "Because there have been administrative delays in investigating and resolving complaints, giving elderly persons this private judicial right would help in enforcing this important law." 124 Cong. Rec. H3925 (daily ed. May 15, 1978). The Senate bill did not include such a right. In conference it was agreed that "any interested person" could bring an action "to enjoin a violation of this Act," but that no such action could be brought "if administrative remedies have not been exhausted." Conference Report No. 95-1618 to accompany H. R. 12255, 47, 87. This development suggests two observations: when Congress intends a private right of action it knows how to say so clearly; Congress intends that when it establishes an administrative procedure, the procedure should be exhausted before involving the judiciary. The discussion of this Act in the brief for HEW ignores this amendment. Fed. Resp. Br. 40-43.

for fee awards when or if an action should exist. The Act is entirely consistent with the conclusion there is no independent private right of action under Title IX but only the right to *a posteriori* judicial review.

The Court of Appeals noted that its first decision had been brought to the attention of Congress during the debate on the Act on October 1, 1976. The Court quoted (559 F. 2d at 1079-80) the following remarks by Representative Railsback during final debate (122 Cong. Rec. H12161, daily ed., October 1, 1976):

> Mr. Railsback. Mr. Speaker, I rise in support of S. 2278 which is designed to allow the court, in its discretion, to award reasonable attorney fees to prevailing parties—other than the United States—in suits to enforce the Civil Rights Acts which Congress has enacted since 1866.
>
> * * * * *
>
> Mr. Speaker, in considering S. 2278 for passage today, I have been alerted to several legal issues which were not raised at hearings held by the Senate and House committees. Not wishing to establish any legal precedents by implication, I would like to make several points explicitly clear with respect to the intent of this bill.
>
> I have been informed by the Committee on Education and Labor as well as several education associations that under title VI of the Civil Rights Act and title IX of the Education Amendments of 1972 there exists a serious question as to whether an individual complainant or class of complainants has the right to sue as a private plaintiff. *To date the Department of Health, Education and Welfare has been the prime enforcer of these titles and in the case of Cannon against University of Chicago, the Seventh Circuit U.S. Court of Appeals stated that Congress gave the right of action to HEW and not to private individuals.*
>
> It has been brought to my attention that by granting attorneys' fees to prevailing parties other than the United States, Congress might implicitly authorize a private right of action under title VI and title IX. This is not the intent of Congress. This bill merely creates a remedy in the event

the courts determine that an individual may sue under these statutes. *This bill does not authorize or statutorily grant any private right of action which does not now exist.* (Emphasis added.)

As the Court below observed, "We doubt that the legislative history could be much clearer." 559 F. 2d at 1080; Cert. Pet. A-27. Certainly, this cannot support an inference that in adopting the Attorney's Fees Awards Act, Congress expressed any opinion as to the intent of the Congress which adopted Title IX six years earlier.

D. Prior Decisions.

Petitioner contends that prior decisions of this Court and lower courts have held that an independent private right of action is cognizable under Title VI, and that these carry over to Title IX.

All the cases cited by petitioner involve public bodies or officials and jurisdiction in each is clear under either the Fifth or Fourteenth amendments.[33] They are no more definitive on the

33. *Laufman* v. *Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S. D. Ohio 1976), cited in the *amici* brief of the National Urban League, et al., 13 n. 24, involved private parties. However, there, the "principal thrust" of the plaintiff's case was "redlining" in violation of Title VIII of the Civil Rights Act of 1968—discrimination in the sale of housing. *Id.* at 491. Defendant resisted the claim of the applicability of Title VI not on jurisdictional grounds, but on the theory that "redlining" was not discrimination within the meaning of Title VI.

HEW cites *Hawthorne* v. *Kenbridge Recreation Association*, 341 F. Supp. 1382 (E. D. Va. 1972) as a case in which a Title VI action was maintained although a suit under 42 U. S. C. § 1983 would not lie because the defendant was a private not-for-profit rural recreation association. Fed. Res. Br. 25. The defendant had received a federally guaranteed loan to build and improve recreational facilities. Membership in the corporation was limited to whites. The suit was by a black plaintiff who applied for membership and had been rejected. The defense was that the loan was an insured loan and therefore specifically exempted under Title VI. The defendant never contested and the court did not discuss the right of the plaintiff to maintain the action. See comments of Justice Stevens in *Bakke*, 98 S.

(Footnote continued on next page)

issue raised here than is *Bakke* itself. In addition, insofar as our research has disclosed, the first time the issue has been directly raised and fully briefed has been in this case.[34] Because of the existence of jurisdiction on other grounds the issue has not been critical in these earlier cases. The disposition of the question in the main opinion in *Bakke* is illustrative. "We find it unnecessary to resolve this question in the instant case . . . Similarly, we need not pass upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies." *Bakke*, 98 S. Ct. at 2745.

Lau v. *Nichols*, 414 U. S. 563 (1973) is petitioner's primary authority. This was a class action on behalf of Chinese-speaking students to compel the San Francisco school district to provide bilingual compensatory education in the English language. Jurisdiction was claimed under 42 U. S. C. § 1983.[35] Violation of the Fifth and Fourteenth Amendments, the California Constitution and Title VI were alleged. The district court and court of appeals held there was no constitutional or statutory violation. 483 F. 2d 791 (9th Cir. 1973).

In the opinion for the majority, Justice Douglas stated that "We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964 . . . to reverse the Court of Appeals." 414 U. S. at 566.

(Footnote continued from preceding page.)

Ct. at 2814: "Because petitioner questions the availability of a private cause of action for the first time in this Court, the question is not properly before us."

34. Since the decision in the Court of Appeals in this case, the issue of independent private action has been briefed in the supplemental briefs in *Bakke* and in *NAACP* v. *Wilmington Medical Center*, 453 F. Supp. 280, 296 (D. Del. 1978). In the latter case the court concluded: "The legislative history, moreover, confirms that Congress intended to accord aggrieved persons a right to post-administrative remedy judicial review under the APA, as contradistinct from an independent and *de novo* proceeding in the federal courts."

35. The jurisdictional statement is set out in the opinion on rehearing of the Court of Appeals in this case. 559 F. 2d at 1083 n. 7; Cert. Pet. A-34, n. 7.

There were two concurring opinions. That of Justice Stewart emphasized the HEW directive specifically requiring bilingual programs "where inability to speak and understand English language excludes national origin-minority group children from effective participation in the educational program." 35 Fed. Reg. 11595. ". . . [I]t is not entirely clear that § 601 . . . standing alone, would render illegal the expenditure of federal funds on these schools." *Id.* at 570.

The concurring opinion of Justice Blackmun cautioned "against the possibility that the Court's judgment may be interpreted too broadly," and emphasized that the case dealt with a large number of students—about 1,800. "For me, numbers are the heart of this case and my concurrence is to be understood accordingly." *Id.* at 571-72.

There are major differences between *Lau* and the present case. One difference is that unlike here, HEW had issued a clear directive on the subject involved.

The critical distinction is that jurisdiction against the public school system was clear under § 1983, and the question of whether Title VI alone confers jurisdiction was neither raised nor argued. This was pointed out by the Court of Appeals: "A review of the briefs filed in the Supreme Court reveals that the parties presented no jurisdictional issues to the Court." The Court concluded that "because plaintiffs' cause of action in *Lau* arose under 42 U. S. C. § 1983, *Lau* simply cannot be read as supporting the proposition that private parties have an implied cause of action under Title VI. . . . [P]laintiff at bar . . . is unable to invoke 42 U. S. C. § 1983 because she is suing private universities acting under color of no state law." 559 F. 2d at 1083; Cert. Pet. A-34.

Petitioner also cites three court of appeals decisions which "expressly had construed Title VI to create a private cause of action." Pet. Br. 8. We disagree with plaintiff's reading of these cases.

The first of these is *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847 (5th Cir.), *cert. denied* 388 U. S. 911 (1967).

It is representative of a line of cases dealing with attempts to avoid the impact of *Brown* v. *Board of Education*, 349 U. S. 294 (1955). The case involved a "new and bizarre excuse" to "rationalize [the] denial of the constitutional right of Negro school children to equal educational opportunities with white children." 370 F. 2d at 849. The suit was against a public school board claiming discrimination against Negro children of members of the armed services stationed at Barksdale Air Force Base. Although the Court did discuss Title VI, it is clear that the decision was bottomed on constitutional grounds: "The key point is that here individuals are suing to enforce a national constitutional right." 370 F. 2d at 851. There was no jurisdictional issue in *Bossier* and it hardly represents support for a private action under Title VI absent constitutional grounds.

Kelley v. *Altheimer Arkansas Public School District*, 378 F. 2d 483, 485 (8th Cir. 1967), another of petitioner's authorities, was a "class action suit in equity pursuant to Title 42, U. S. C. § 1983." This case cannot be read as supporting the proposition, even by implication, that Title VI permits private actions. *Kelley* was a public school desegregation case brought only under 42 U. S. C. § 1983, and its jurisdictional counterpart, 28 U. S. C. § 1343. Both the questions of liability and relief were measured by traditional equal protection standards. Title VI was discussed only for the purpose of rebutting the argument that HEW's approval of the Altheimer School District's voluntary plan of desegregation, which had been submitted in response to HEW regulations under Title VI, did not exonerate the defendant from judicially-determined *constitutional* violations.

In *Cypress* v. *Newport News General and Nonsectarian Hospital Association*, 375 F. 2d 648 (4th Cir. 1967), the third case cited by petitioner, the court described the jurisdictional basis: "Plaintiffs rely upon 42 U. S. C. §§ 1981 and 1983 and the Fifth and Fourteenth Amendments." at 651 n. 1. *Cypress* involved racially discriminatory practices of a partially govern-

ment-funded hospital.[36] Title VI was discussed only for the purpose of determining the appropriate relief to be granted. The hospital argued that HEW's determination that the hospital was in compliance with Title VI principles obviated the necessity for injunctive relief. The Court of Appeals rejected this argument because of its concern that HEW certification was an "undependable means of effectuating the plainly established constitutional rights of the plaintiffs." 375 F. 2d at 660.

None of these cases "expressly . . . construed Title VI to create a private cause of action," as petitioner claims. Pet. Br. 8. In fact, none considered the question.[37]

36. This case is probably no longer valid authority for a constitutional claim under § 1983 since *Moose Lodge* v. *Irvis*, 407 U. S. 163 (1972). See *Doe* v. *Bellin Memorial Hospital*, 479 F. 2d 756 (7th Cir. 1973).

37. *Amici* cite a total of twelve additional cases. All are subject to the same distinctions noted in the cases discussed above. Exemplary is *Uzzell* v. *Friday*, 547 F. 2d 801 (4th Cir. 1977), opinion on rehearing en banc 558 F. 2d 727 (1977) vacated and remanded 98 S. Ct. 3139 (1978). *Uzzell* involved racially discriminatory practices at the University of North Carolina, which plaintiffs "assailed as contravening the Fourteenth Amendment, the Civil Rights Act of 1871, 42 U. S. C. § 1983, and the Civil Rights Act of 1964, Title VI, 42 U. S. C. § 2000d." *Id.* at 802 (footnote omitted). With neither discussion nor citation of authority, the Court of Appeals noted that "jurisdiction is afforded here by 28 U. S. C. §§ 1331 and 1343. . . ." *Id.* at 802 n. 3. The court's conclusion that the assailed practices entitled the plaintiffs to relief rested on the premise that both the Constitution and the statutes had been violated. *Id.* at 804. Once again, the question of private enforceability of Title VI was not addressed by the court.

HEW argues that since there were a number of cases indicating "judicial approval of private litigation" under Title VI at the time Title IX was adopted, this is "persuasive evidence that [Congress] expected private suits to be permitted under Title IX." Fed. Resp. Br. 31-32. There is not a single reference in the legislative history of Title IX to a court case purporting to manifest such "judicial approval." As the Court of Appeals observed in this case:

> First of all, we do not read those decisions as affirmatively establishing the existence of an implied private right of action under Title VI at the time Title IX was enacted. More important, there is nothing in the legislative history of Title IX itself indicating that Congress was even aware of those decisions, let alone intended to adopt their construction of Title VI.

559 F. 2d at 1081-82; Cert. Pet. A-31.

CONCLUSION.

The plain terms of Titles VI and IX and their legislative history clearly show a congressional intent not to establish an independent private right of action. The subsequent legislative enactments and prior decisions relied on by petitioner and the federal respondents do not detract from that conclusion.

The legislative history shows beyond question that the procedures under section 602 of Title VI and section 902 of Title IX were to be the means of enforcement. A private right of action independent of the enforcement procedures would frustrate the clearly expressed congressional intent to provide a "reasonable, moderate, cautious, carefully worked out solution to a situation that clearly calls for legislative action." Sen. Humphrey, 110 Cong. Rec. 6544.

HEW contends that private enforcement "poses no threat to the stability of federally funded education programs or to the efficacy of administrative enforcement measures." Fed. Resp. Br. 52.

We do not follow the argument. Even assuming that a court could require the admission of a claimant such as petitioner which we believe it could not do under the remedy directed in *Rosado* v. *Wyman*, 397 U. S. 397 (1970)[38]—the efficacy of the administrative process would necessarily be compromised. If a court should decide in an independent private action that there had been discrimination under Title IX, the administrative agency is either bound by that decision, in which event the administrative procedures are clearly bypassed, or it may act independent of the judiciary and thus have the capability for deciding contrary to the court. In the event of judicial review of that decision, the court may be required to uphold the agency

38. See *supra* n. 11.

action under the Administrative Procedure Act standard of review even though the court may have decided the discrimination question the other way through the independent private action.

Despite its claim that a private action poses no threat to the efficacy of administrative enforcement measures, HEW elsewhere appears to recognize the validity of Justice White's observation in *Bakke* that a private right of action would "jeopardize the administrative processes so carefully structured into the law." *Bakke*, 98 S. Ct. at 2798. HEW, in a disarmingly frank statement, concedes that it will act here only if the Court decides petitioner has no independent private right of action:

> If petitioner does not prevail in her contention that Title IX creates a private right of action, the federal respondents will, of course, *fulfill their responsibility* under applicable regulations to conduct an administrative investigation of petitioner's charges against the University of Chicago and Northwestern University. Fed. Resp. Br. 54 n. 33. (Emphasis added.)

One wonders why HEW has not acted to fulfill its responsibility to complete its investigation of the Cannon complaint filed with it months before this litigation started if indeed there is no conflict between an independent private right of action and the administrative process.

Perhaps the answer lies in Justice Black's admonition in *Rosado* v. *Wyman*, 397 U. S. 397, 434 (1970):

> And in instances when HEW is confronted with a particularly sensitive question, the agency might be delighted to be able to pass on to the courts its statutory responsibility to decide the question.

The issues raised by the Cannon administrative complaints are acknowledged by HEW to be "of first impression and national in scope." It told her that "national . . . policy must be developed." It completed its on-site investigations by June 1976. It assured her at that time it would "move as expeditiously as possible." Cert. Pet. A-35. It has not been heard from since,

except through briefs in this litigation arguing first why it had exclusive jurisdiction and then why it did not.

Petitioner's remedy lies against HEW under her alternative claim for relief before this Court.[39] Pet. Br. 20. "To hold otherwise would be to permit the defendants [HEW] to avoid their statutory duty by simply failing to conclude the investigatory process." *Brown* v. *Weinberger*, 417 F. Supp. 1215, 1221 (D. D. C. 1976). See also, *Adams* v. *Richardson*, 480 F. 2d 1159 (D. C. Cir. 1973) (*en banc*).

We respectfully request that the decision of the Court below holding there is no independent private right of action under Title IX be affirmed.

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November, 1978.

39. HEW points out that the petition for a writ of certiorari did not raise the question of the propriety of the Court of Appeals ruling on petitioner's alternate claim for relief against HEW under the Administrative Procedure Act, 5 U. S. C. § 706 to "compel agency action unlawfully withheld or unreasonably delayed." Fed. Resp. Br. 54 n. 33. The Court of Appeals denied the claim "since HEW is actively investigating plaintiff's complaint and the delay involved of about one year has not been unreasonable." 559 F. 2d at 1077; Cert. Pet. A-20. This opinion was issued in August 1976, shortly after HEW advised petitioner that it had completed the "on-site portion of the investigations". Cert. Pet. A-35. HEW now admits it is not actively investigating her complaints, which have now been pending before the agency for over three and one-half years. Whether or not the question is properly before the Court on the certiorari petition, petitioner would now appear to have a valid claim against HEW under 5 U.S.C. § 706.

APPENDIX.

TITLE IX, EDUCATION AMENDMENTS OF 1972

20 U. S. C.—

§ 1681 [§ 901]. Sex—Prohibition against discrimination; exceptions.

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

* * * * *

§ 1682 [§ 902]. Federal administrative enforcement; report to congressional committees.

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has

been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§ 1683 [§ 903]. Judicial review.

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion wtihin the meaning of section 701 of that Title.

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§ 2000d [§ 601]. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

§ 2000d-1 [§ 602]. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has

been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§ 2000d-2 [§ 603]. Judicial review; Administrative Procedure Act

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.